U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 July 2004

CASE NO.: 2003-LHC-1845

OWCP NO.: 07-157993

IN THE MATTER OF:

JOSEPH J. MILLER,
Claimant

v.

P&O PORTS LOUISIANA, INC.,
Employer

APPEARANCES:

William S. Vincent, Jr., Esq.,
On behalf of Claimant

William C. Cruse, Esq.,
On behalf of Employer

Before: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et. seq.* (2001) brought by Joseph J. Miller (Claimant) against P&O Ports Louisiana, Inc. (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on March 18, 2004, in Metairie, Louisiana. Each party was represented by counsel and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The

[1] Post-hearing briefs were filed by the parties on May 19, 2004.

following exhibits were received into evidence: Joint Exhibit 1, Claimant's exhibits 1-19, and Employer's exhibits 1-17.[2] This decision is based on the entire record.

I. STIPULATIONS

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. An accident occurred on September 18, 2000;
2. The accident was in the course and scope of Claimant's employment;
3. An employer-employee relationship existed at the time of Claimant's accident;
4. Employer was advised of the accident on September 18, 2000;
5. Employer filed Notices of Controversion on February 8, 2001 and January 13, 2003;
6. An informal conference was held on January 7, 2003;

II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation of Claimant's alleged back and psychological injuries;
2. The nature and extent of Claimant's disability;
3. Date Claimant reached maximum medical improvement;
4. Employer's liability for the unpaid medical bills of Dr. Macgregor and Dr. Murphy;
5. Average weekly wage at the time of injury;
6. Attorney's fees.

III. STATEMENT OF THE CASE

Testimonial and Non-Medical Evidence

Claimant testified he was a C and D student in high school, but he graduated and received two years of training in automotive repair. Claimant went through the police academy in 1982 and worked with the New Orleans Police Department for a few years before joining the Army Guard as a combat engineer. (Tr. 42-44). Claimant's full-time work included mechanic work at Mossy Oldsmobile and Delta World Tires, but his primary job since 1990 was as a Longshoreman. For 11 weeks in 2000, Claimant voluntarily left the Longshore industry to start his own pressure washing business, but when the business failed Claimant returned to Longshore. (Tr. 45-48, 96).

Claimant suffered an injury to his foot on September 18, 2000, wherein a co-worker threw an eight-foot four-by-four into the hold of ship where Claimant was working, striking his

[2] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX __, p.__; Employer exhibits- EX __, p.__; Joint exhibits- JX __, p.__; Administrative Law Judge Exhibits- ALJX__, p.__.

foot and resulting in multiple fractures. Claimant testified he was initially treated at Touro Hospital and by the company physician, Dr. Steiner, before choosing Dr. Manale as his treating physician. Claimant further testified Employer required him to continue treating with Dr. Steiner, and was reluctant to authorize his treatment with Dr. Manale. Dr. Manale prescribed physical therapy for Claimant, which helped but was terminated by Employer. Claimant testified his compensation benefits were cut-off because he was not in a work-hardening program. (Tr. 52-54). Dr. Steiner referred Claimant to Dr. Hubbell, who treated him with physical therapy, exercise and sympathetic pain blocks, all which improved his pain. (Tr. 55-56).

Claimant underwent a functional capacity evaluation and unsuccessfully attempted to return to Longshore work. When Claimant actually worked, his pain increased and he eventually stopped working secondary to pain. (Tr. 56-57). After this, Claimant had no meaningful employment, other than some work installing drainage pipes for a friend and with Rockport Construction. He stopped both jobs due to his physical limitations. Claimant also earned about $375 at Lido Trucking and $675 at the Redfish Tour. (Tr. 58-59, 87-91, 96-98).

In May 2002, Claimant suffered severe pain in his foot radiating up his leg, causing discomfort with walking and climbing. Dr. Hubbell performed electric stimulation three times per week, but Claimant testified the appointments were not timely approved by Employer, extending his pain. (Tr. 60-62, 111-12). Claimant was prescribed medication for his pain and aggressiveness; he was under a lot of stress from his pain and lack of income. Dr. Hubbell next performed a series of three nerve blocks in an attempt to treat Claimant's pain more aggressively, but only the first block provided relief of Claimant's pain. (Tr. 62-63). Dr. Hubbell then inserted a permanent stimulator implant in Claimant's back to relieve his foot pain in February 2003, which subsequently caused Claimant back pains. He received relief until May 2003, after which his pain steadily increased. The frequency of his implant was adjusted, but it continued to malfunction and in September 2003 Dr. Hubbell informed Claimant the implant was broken. Since the unit was fixed, Claimant cannot turn it up as high and he has mild-moderate pain with activity, but absent activity his pain is minimal. (Tr. 64-68, 113-15, 123-25).

Dr. Hubbell referred Claimant to Dr. Wolfson for psychological treatment. After his accident, Claimant became anti-social and suicidal, lost his appetite and was not intimate with his girlfriend. (Tr. 68-70, 72). Dr. Wolfson diagnosed him with adjustment disorder; in March 2003 his psychological condition was improved. Claimant attempted to return to Dr. Wolfson in the fall of 2003 but could not arrange an appointment; Claimant did not seek further authorization from Employer but conceded he was not expressly denied treatment from Dr. Wolfson. (Tr. 70-71, 130-32). He became "very upset and emotional" in October 2003 and began treating with Dr. Macgregor on referral from his attorney. (Tr. 72). When Claimant started treating with Dr. Macgregor he was under financial stress which recently subsided secondary to Claimant receiving money from Employer. (Tr. 73-75, 135-38, 142-43).

Claimant testified the Department of Labor's Cynthia Harris sent him to several potential employers. (Tr. 75-77). Claimant applied at McDonald's, Crescent City Decals, New Orleans Airport parking garage, Star Security, Photo, Inc., Captain Redbone Fishing Charters and Speculizer (sic) Lures, Boat Stuff, Cajun Resorts, Young Fishing Charters, John Taylor Charters, Metro Boating, Rippin-Lip Guide Service, Don's Wrecker Service and Frank's Lawn Care, all

without success. Claimant testified he needed his own boat and equipment for most of the fishing tour positions. (Tr. 80-91, 103-06, 126).

Claimant testified he did not have physical limitations prior to the September 2000 accident. Since the second surgery he has experienced deep pain in his back, along with the pain in his leg and feet. At the hearing, Claimant showed the undersigned the scars on his abdomen and spine; the pictures were admitted as ALJX-1. (Tr. 91-94).

Ms. Reid testified she has been Claimant's girlfriend for the past 16 years and has lived with him for the past 15 years. After Claimant's accident they had to move out of their house and his truck was repossessed. (Tr. 145-47, 154, 159-60). Ms. Reid corroborated Claimant's testimony that he suffered depression after the accident. Claimant's condition improved while he treated with Dr. Wolfson. (Tr. 147-49). When Claimant's implant broke he again became depressed and suicidal. His mood seemed to improve after treating with Dr. Macgregor. Ms. Reid testified receiving the money eased a lot of Claimant's tension. (Tr. 151-53, 158). She stated Claimant complained of difficulties walking and back pain with the implant; an increase in his pain prior to the hearing caused further depression. (Tr. 153-55). Ms. Reid testified Claimant goes out and applies for jobs whenever he gets the chance. She described Claimant as an excellent fisherman, which is a job he really wants to do, but he needs his own boat. (Tr. 155-57).

Mr. Arceneaux was the claims adjuster for Claimant's case. He testified Claimant chose Dr. Manale to be his treating physician. (Tr. 33-34). Mr. Arceneaux was aware Dr. Miller, Dr. Steiner and Dr. Manale were concerned about the existence of sympathetic reflex dystrophy in Claimant's foot and that said condition would require medical treatment if diagnosed. (Tr. 37-38). Mr. Arceneaux did not recall when he cut off compensation benefits or when he received a labor market survey for Claimant. He testified he is aware Claimant is restricted from bending and working overhead as a result of the stimulation unit placed in his back to treat his foot injury. Mr. Arceneaux testified Claimant's implant had to be replaced in 2003 because he over-exerted himself. (Tr. 38-41). Mr. Arceneaux testified Dr. Steiner was retained as Employer's choice of physician and that all bills from Dr. Hubbell, Dr. Manale and Dr. Wolfson have been paid. He clarified that Dr. Wolfson discharged Claimant from his care without requesting authorization for further treatment. Mr. Arceneaux explained he denied bills from Dr. Murphy and Dr. Macgregor because there was no indication from Claimant's treating physicians that he needed further orthopedic or psychiatric care. With respect to a bill from Health South Physical Therapy for the 2003 FCE, Mr. Arceneaux testified he never received a bill from Claimant, but would be willing to pay it in accordance with the fee schedule. (Tr. 215-25).

The Department of Labor referred Claimant to vocational rehabilitation counselor Cindy Harris in June 2003. After meeting with Claimant and performing a vocational evaluation, Ms. Harris recommended he enroll in vocational technical training. Academic testing performed by Weiss Rehabilitation Employment Assessment Program in July 2003 placed Claimant at the 10.2 grade level in reading, 5.7 grade level in math, 9.7 grade level in language and at the 8 grade level overall. The vocational counselor at Weiss reported Claimant did not possess any suitable or minimal aptitudes necessary for success in 66 different work groups encompassing all jobs available in the U.S. labor market. In January 2004, Ms. Harris identified positions as a cutter

with Crescent City Decals, assembler, inspector pack and production worker for Claimant. (*See* CX-14 and CX-15).

Ms. Favaloro, a vocational rehabilitation expert, conducted a vocational evaluation of Claimant on behalf of Employer. Ms. Favaloro initially met with Claimant September 5, 2003; the information Claimant provided her regarding his lifestyle, educational background, and work experiences were consistent with his testimony at the hearing. In addition, Claimant informed Ms. Favaloro his driver's license was suspended but he intended to get it reinstated, and he has not done any meaningful work since December 2000. Ms. Favaloro acknowledged Claimant's FCEs released him to work at the heavy physical demand level, although the 2003 FCE restricted him from reaching overhead or bending his hips more than 90 degrees. Ms. Favaloro reported Claimant was a high school graduate with excellent communications skills and a number of acquired skills transferable into many work settings. (Tr. 165-68; EX-10, pp. 1-4).

In her October 7, 2003 labor market survey, Ms. Favaloro identified seven jobs (dispatcher [2], toll collector, parking booth attendant, unarmed gate guard, total rewards host and production technician) in the Greater New Orleans area which were within Claimant's physical restrictions and appropriate in light of his educational and vocational experience. The jobs paid between $6.50 and $9.18 per hour and were approved by Dr. Hubbell and Dr. Steiner. In her March 4, 2004 report, Ms. Favaloro listed thirteen jobs (production worker, cashier, lock and dam equipment worker, dispatcher [2], forklift operator, warehouseman, heavy duty cleaner, customer safety officer, shuttle bus drier, chauffeur, vending route driver and vending route sales) within Claimant's physical restrictions and educational/vocational background, which paid between $6.50 and $14.61 per hour. Ms. Favaloro clarified that although Claimant did not have a valid driver's license the driving positions were not the high paying jobs and did not affect the average wage available to him. (*See* EX-10, Tr. 178-79). She further testified that she did not receive Dr. Hubbell's January 16, 2004 letter restricting Claimant from overhead lifting, reaching, stooping bending or twisting. Although he was able to perform these activities in his 2003 FCE, Ms. Favaloro acknowledged the additional restrictions may render the vending route, heavy duty cleaner and toll collector positions unsuitable. Additionally, she stated the production technician job description did not discuss how much bending, twisting or stooping was involved. (Tr. 194-99, 205).

Claimant's wage records from Employer, submitted as CX-16, indicate he earned a total of $28,731.39 for 41 weeks of work during the year immediately preceding his injury, from September 27, 1999 to September 18, 2000. In addition, Claimant earned $1,180.00 in wages in January 2001 and $838.50 from September 17, 2001 to October 15, 2001. (*See* CX-16).

Medical Evidence

Claimant treated at Touro Infirmary on September 18, 2000, for throbbing pain and swelling in his right foot secondary to his work injury. X-rays revealed a fracture at proximal second metatarsal and two small calcifications. Claimant was diagnosed with second metatarsal fracture and blunt trauma to the right foot, with possible avulsion fractures. The emergency room physician prescribed Vicodin and instructed Claimant to follow up with Dr. Patterson and Dr. Nutik. (CX-13, pp. 1-8).

Dr. Steiner, an orthopedic surgeon and Dr. Nutik's associate, treated Claimant from September 20, 2000, until October 8, 2001. Claimant initially presented with pain, tenderness and swelling in his right foot, stiffness in his toes and occasional tingling. X-rays revealed an avulsion-type fracture of the first metatarsal. Dr. Steiner opined Claimant had a good prognosis for recovery but did not release Claimant to work. (CX-7, pp. 25-26). Dr. Steiner noted slow and steady progress, and on October 25, 2000, he stated Claimant was capable of sedentary work with no prolonged standing or walking and no climbing, kneeling and squatting. In a December 22, 2000 letter to Employer, Dr. Steiner stated Claimant could perform light duty work with alternate standing and sitting and some walking. (CX-7, pp. 14-19).

A December 13, 2000 MRI was normal and Dr. Steiner recommended continued physical therapy and light duty work. (CX-7, p. 12). On February 23, 2001, Dr. Steiner recommended evaluation and treatment for RSD, referring Claimant to Dr. Hubbell, an anesthesiologist and pain management specialist. On May 4, 2001, Dr. Steiner recommended work hardening and an FCE. He opined Claimant was capable of returning to full duty work and that he reached MMI as of September 13, 2001. Dr. Steiner assigned a 15% permanent impairment rating on October 8, 2001. He noted Claimant had continued discomfort and was taking Wellbutrin, Naproxen and Neurontin, but was capable of full duty work. (CX-7, pp. 1-8).

Dr. Manale, an orthopedic surgeon, treated Claimant from October 5, 2000, until October 18, 2001. Although he was apparently Claimant's choice of physician, Dr. Manale was instructed by Mr. Arceneaux to follow Dr. Steiner's recommendations. He initially diagnosed Claimant with contusion and tendonitis of the foot, based on what he interpreted as grossly normal x-rays. He found Claimant not suited for work. Based on a bone scan of Claimant's right foot, Dr. Manale diagnosed him with a sprain and possible fracture on November 15, 2000. Dr. Manale noted that physical therapy improved Claimant's condition, and when Employer terminated its authorization for physical therapy Claimant became more symptomatic. In May 2001, Dr. Manale noted Claimant's condition improved under Dr. Hubbell's care; he was diagnosed with RSD, but received pain relief from electrical shock treatments. At Claimant's last visit on October 18, 2001, Dr. Manale noted Claimant had returned to Longshore work but experienced significant pain and discomfort. He diagnosed RSD, sprain, and contusion of the right foot, and opined Claimant was 15% disabled. (CX-6, pp. 1-19).

Claimant's Exhibit 5 and Employer's Exhibits 12 and 16 are the medical records and deposition of Dr. Hubbell, Claimant's pain management specialist. Dr. Steiner referred Claimant to Dr. Hubbell, who has treated him since March 28, 2001. Dr. Hubbell diagnosed Claimant with reflex sympathetic dystrophy, as well as anxiety and depression secondary to his pain. He performed a lumber sympathetic block on May 15, 2001. On September 6, 2001, he stated Claimant was at MMI, but he did not assign an impairment rating. Dr. Hubbell released Claimant to heavy work pursuant to the August 2001 functional capacities evaluation, adding he would need occasional breaks from standing or walking. Dr. Hubbell prescribed medications and performed additional sympathetic pain blocks in May and October 2002. He referred Claimant to Dr. Wolfson in August 2002, for injury-related psychological problems. In November 2002, Dr. Hubbell performed a radiofrequency pain block. From May 2002 to December 2002, Dr. Hubbell indicated Claimant was not at MMI and was unable to walk, lift or

bend. He testified he did not notice any psychological problems after November 2002. (*See* EX-12; EX-16).

In February 2003, Dr. Hubbell implanted a permanent lumbar stimulator unit into Claimant's back and found him to be at MMI as of March 26, 2003. Pursuant to an April 2003 FCE, Dr. Hubbell released Claimant to heavy duty work with no overhead reaching or bending more than 90 degrees at the waist on May 21, 2003. (*See* EX-16, p. 33). Claimant's implant malfunctioned in September 2003, further restricting his activities, but Dr. Hubbell was able to repair it and opined it did not affect Claimant's MMI. Although Dr. Hubbell indicated the temporary return of pain caused Claimant some distress, Claimant did not exhibit any signs of psychological impairment. Dr. Hubbell testified Claimant will continue to need medical treatment to adjust the frequency of his stimulation unit and possibly replace it in the future.

Dr. Hubbell testified Claimant first complained of back pain in January 2004. He opined the implant, RSD and antalgic gait may be contributing factors to Claimant's back pain. However, he testified it was more likely than not that Claimant's pain was from his back spasms related to degenerative disc disease. In a letter dated January 16, 2004, Dr. Hubbell stated the implant device restricts Claimant from overhead lifting, reaching, stooping, bending or twisting at the waist. He further stated "the patient is well aware of these restrictions and is compliant." (*See* EX-13; CX-5, p. 15).

Dr. Murphy, an orthopedic surgeon, examined Claimant on March 1, 2004. He reported Claimant suffered back spasm, limited flexion, chronic problems with his right lower extremity and symptoms of degenerative lumbar disc disease. Dr. Murphy opined Claimant's restrictions in his back were from his implant surgery, which was work related, and that his disability rating was a result of his RSD. He stated Claimant did not need orthopedic treatment. (CX-4, p. 1).

Dr. Wolfson treated Claimant for psychological problems from August 29, 2002 until March 25, 2003. Dr. Wolfson initially noted Claimant suffered from stress related to financial problems and working through a lot of pain. He diagnosed Claimant with adjustment disorder characterized by depressed mood, anhedonia, weight loss, fatigue, diminished ability to concentrate and sleep disturbance. Dr. Wolfson initiated short-term psychotherapy and anti-depressant medication on September 18, 2002, to treat Claimant's adjustment disorder and complications related to his chronic pain. On March 25, 2003, Dr. Wolfson expressed a positive outlook on Claimant's return to work. In April 2003 he stated Claimant was not psychologically impaired from working and discharged him from his care. (*See* EX-8).

Claimant's attorney referred him to psychiatrist Dr. Macgregor, who treated Claimant on November 20, 26 and December 10, 2003. Dr. Macgregor noted Claimant appeared more depressed than anxious and had suicidal ideations. He diagnosed Claimant with acute major depressive disorder as a direct result from his work accident and subsequent pain and physical incapacitation. Dr. Macgregor recommended psychotherapy and medications, and indicated Claimant's continuing significant pain will result in recurring depression. In a March 8, 2004 letter, Dr. Macgregor explained his diagnosis of major depressive disorder is supported by both his and Dr. Culver's reports identifying pent-up anger and irritability, insomnia, appetite changes

with weight gain and loss, depressive mood, social isolation, loss of energy, recurring suicidal ideation, decreased libido, anxiety and generalized nervous tension. (*See* CX-3).

Dr. Culver conducted a psychiatric evaluation of Claimant on January 8, 2004, at Employer's request. Based on a review of Claimant's complete medical and vocational records, as well as an interview with Claimant about his social and medical history, Dr. Culver diagnosed Claimant with depressive disorder not otherwise specified, alcohol abuse, personality disorder not otherwise specified and reflex sympathetic disorder. He acknowledged Claimant exhibited a good response to Dr. Wolfson's psychotherapy as well as the lumbar stimulator unit implanted in his back. As Claimant was not in pain, Dr. Culver opined his current psychological problems were not work-related. (*See* EX-14). At his deposition, Dr. Culver testified Claimant had no work-related psychological problems and was not psychologically disabled. He further explained Claimant's depression was mild and formed recently, whereas his personality disorder was longstanding and formed during his childhood. Dr. Culver recommended low doses of anti-psychotic or anti-depressant medication, as well as psychotherapy, to sort out his long-standing problems which he specifically stated were not work-related. (*See* EX-17, EX-14)

IV. DISCUSSION

Causation

Section 20(a) of the Act provides the claimant with a presumption that his disabling condition is causally related to her employment if he shows that he suffered a harm and that an accident occurred or employment conditions existed which could have caused, aggravated or accelerated the condition. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l., Inc.*, 16 BRBS 98 (1984). It has been consistently held that the Act must be construed liberally in favor of the claimant. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an accident occurred on September 18, 2000, during the course and scope of Claimant's employment. The parties do not dispute that Claimant injured his right foot and developed reflex sympathetic dystrophy (RSD) as a result of the accident. Employer does contend, however, that the implant in Claimant's back does not constitute a compensable "injury" under the Act and, alternatively, it did not compound Claimant's disability from his foot injury.

Dr. Hubbell testified RSD can radiate from the foot up the leg and into the back. He explained that it is common and effective to treat RSD in the foot with an implant in the lumbar spine. Claimant credibly testified he experienced back pain following the implant of the device and Dr. Hubbell testified the RSD and implant were contributing factors to Claimant's back pain. Furthermore, Dr. Murphy opined Claimant's back pain and subsequent restrictions were the result of the implant. The record is also clear that the implant restricts Claimant's motions and, in turn, his ability to work. Consequently, as the implant was approved treatment for Claimant's work-related foot injury, any subsequent problems arising from the implant are also work-related and compensable. Thus, Claimant has invoked the Section 20(a) presumption with respect to his back pain.

Dr. Hubbell and Dr. Murphy both noted Claimant exhibited symptoms consistent with degenerative lumbar disc disease, however, only Dr. Hubbell indicated Claimant's back pain may be more related to the disc disease than the implant. Dr. Hubbell, however, also testified the implant and RSD were contributing factors to Claimant's back pain. I thus find that his testimony does not constitute substantial evidence which serves to rebut the Section 20(a) presumption that Claimant's back pain is, at least in part, the result of his implanted nerve stimulator device. Thus, Claimant's back pain constitutes a compensable injury.

Similarly, while Employer concedes Claimant suffered depression and anxiety in 2002 secondary to his work-related injury, it contends the onset of Claimant's depression in November 2003 is not work-related. Dr. Wolfson treated Claimant from September 2002 until April 2003 for depression and anxiety. Dr. Wolfson discharged Claimant on April 15, 2003, indicating psychotherapy, anti-depressant medication and the stimulator implant helped Claimant adjust to his pain and reduce his depression such that he no longer needed psychiatric care. Both Claimant and Ms. Reid credibly testified his depression returned when his implant malfunctioned in the summer of 2003. Although it is unclear why Claimant was unable to return to Dr. Wolfson for further treatment, Claimant's testimony of his depression was corroborated by Dr. Macgregor's diagnosis of major depressive disorder on November 20, 2003. Based on his meetings with Claimant, as well as Dr. Culver's January 2004 report, Dr. Macgregor identified at least seven symptoms which were consistent with major depressive disorder. Dr. Macgregor's conclusion that Claimant's onset of pain triggered or aggravated his chronic depression and adjustment disorder is reasonable, and supported by Dr. Hubbell's note that Claimant was distressed from the onset of pain in September 2003. Thus, Claimant has presented sufficient evidence to invoke the Section 20(a) presumption with respect to his psychological problems.

Employer contends that Claimant's depression in November 2003 was not work-related because Dr. Hubbell did not notice any psychological problems, other than some distress, and Dr. Macgregor rendered his diagnosis after Claimant's implant was fixed and he was no longer in pain. Additionally, Dr. Culver testified that because Claimant was no longer in significant pain and suffered a long-standing personality disorder his psychological problems were not work-related.

I do not agree with Employer. I find this does not constitute substantial evidence sufficient to rebut the Section 20(a) presumption that Claimant's increase in pain could have triggered or aggravated his depression. Dr. Hubbell noted Claimant appeared in distress when

his implant malfunctioned and he testified this would be normal, as Claimant probably would have problems adjusting to a sudden onset of pain. Additionally, Claimant credibly testified his depression returned when his implant malfunctioned. In the past, Claimant received psycho-therapy and anti-depressant medication in addition to the relief of physical pain, all which Dr. Wolfson indicated helped him resolve his adjustment disorder and depression. There is nothing in the record which indicates that resolving the pain alone would be enough to resolve Claimant's depression as well. Also, while Dr. Culver diagnosed Claimant with depression and personality disorder not otherwise specified, Dr. Macgregor used that report to explain how Dr. Culver's findings actually supported a diagnosis of major depressive disorder. As such, the evidence relied upon by Employer does not serve to rebut Claimant's presumption that he suffers from a compensable psychological injury as a result of his implant malfunctioning and the return of his back pain.

Nature and Extent

The claimant bears the burden to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of MMI is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Drs. Steiner, Manale and Hubbell each assigned Claimant an MMI date. Dr. Steiner, Employer's choice of orthopedist who treated Claimant from September 20, 2000 to October 8, 2001, opined Claimant reached MMI as of September 13, 2001. Dr. Manale, Claimant's choice of orthopedist, treated Claimant from October 5, 2000 to October 18, 2001, and opined he reached MMI by October 18, 2001. Dr. Hubbell was Claimant's pain management specialist and treated him the longest, from March 28, 2001 to the present. Dr. Hubbell opined Claimant reached MMI on two different dates. First, he stated Claimant reached MMI on September 6, 2001, based on the August 2001 FCE which released him to heavy duty work. However, Dr. Hubbell testified Claimant was not at MMI from May 2002, when Claimant returned with significant pain, until March 26, 2003, when he reassigned MMI following the nerve stimulator implant.

Consequently, although Claimant was found to be at MMI and released to work by his three physicians in September 2001, I find the return of his pain in May 2002 which necessitated more aggressive treatment by Dr. Hubbell undermines and renders these initial MMI dates invalid. As to his foot and back injuries, based on the entirety of Claimant's medical records, I

find he reached MMI on March 26, 2003. Although his implant required fixing in September 2003, I find reasonable Dr. Hubbell's opinion that this did not affect MMI, but is something which is to be expected periodically. As to the back pain caused by the implant, while it might well cause Claimant discomfort, some restrictions and the need for follow-up care, it is not an injury or disease from which Claimant will reach maximum medical improvement. Rather, it is a form of treatment that has caused Claimant further disability.

As to Claimant's mental condition, while the evidence does not support a finding that Claimant is unable to work, the opinion of Dr. Macgregor does not suggest Claimant has reached MMI. Dr. Macgregor opined Claimant is in need of further psychological treatment for his acute major depressive disorder. Dr. Wolfson did not think Claimant was in need of further psychotherapy when he was released to work in April 2003, but Dr. Wolfson was unaware of Claimant's later onset of depression. As for Dr. Culver, he only saw Claimant once at Employer's request and I am inclined to accept Dr. Macgregor's well-reasoned opinion over that of Dr. Culver. As such, I find Claimant has not reached MMI with respect to his psychological condition and remains temporarily disabled.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin,* 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

Employer concedes Claimant was not capable of returning to his previous Longshore work pursuant to the August 2001 FCE, prior to the implant, which restricted him to heavy, not very heavy, duty work with occasional breaks from standing and walking. Employer, however, did not attempt to establish the existence of suitable alternative employment until Ms. Favaloro's first labor market survey was released on October 8, 2003. Thus, I find Claimant is entitled to temporary total disability from September 18, 2000 until October 8, 2003, based on a combination of his back and foot injuries (which became permanent on March 26, 2003, when he reached MMI), and his psychological injury which continues to be temporary in nature.

Employer contends that Claimant only suffers permanent partial disability secondary to his foot injury, which it has fully compensated by paying him a scheduled award for the 15% impairment rating.[3] Employer argues that for Claimant to receive unscheduled disability benefits for his back and psychological injuries, he must prove they further restrict his ability to work and

[3] Although Claimant did not reach MMI with respect to his foot until 2003, the only impairment rating available was rendered by Dr. Steiner on October 8, 2001. Since the second MMI date, the only orthopedist to examine Claimant was Dr. Murphy who deferred to Dr. Hubbell for an impairment rating. Dr. Hubbell stated he is not qualified to render impairment ratings. Therefore, as there is but one permanent impairment rating, I find Claimant suffers a 15% impairment in his right foot.

negatively impact his post-injury wage earning capacity. In support of its argument, Employer relies on an ALJ Decision and Order on Remand which sets out two threshold determinations for this situation. "First, does the unscheduled injury alone render a claimant unable to return to his usual employment? Second, did the unscheduled injury contribute to the claimant's loss in wage-earning capacity?" *Anthony v. Newport News Shipbuilding & Dry Dock Co.*, 1999 WL 1124613 (November 8, 1999)(ALJ). In applying this legal standard in *Green v. I.T.O. Corp. of Baltimore*, the Board awarded disability benefits based on the fact the claimant could not return to his usual employment because of his unscheduled shoulder injury alone and "[m]oreover, the administrative law judge found that claimant was unable to perform certain post-injury jobs that he attempted as his shoulder injury prevented him from performing these jobs." 32 BRBS 67, 70 (1998).

In the present case, both the 2001 and 2003 FCEs indicated Claimant was capable of performing work at the heavy physical demand level. However, Dr. Hubbell further restricted Claimant from flexing his hips more than 90 degrees, raising his elbows above his shoulders, stooping, bending, twisting and reaching, secondary to his implanted device. Mr. Arceneaux conceded the implant restricted Claimant's activity, and testified it was his belief the device broke in 2003 because of Claimant's overexertion. Furthermore, Ms. Favaloro testified the additional restrictions were not known to her when she conducted her labor market survey and may preclude Claimant from some of the jobs she identified as suitable.

Indeed, I find the warehouseman, heavy duty cleaner, customer safety officer, vending route driver and vending route sales positions are not suitable for Claimant as they required activities including bending, twisting, reaching or stooping. Additionally, the suitability of the toll collector position is questionable; although Dr. Hubbell approved it, Ms. Favaloro testified the "light reaching" requirement may be outside his restrictions. While I do not find any evidence in the record which would support a conclusion that Claimant's psychological injuries keep him from working, I find Claimant's unscheduled back injury and restrictions secondary to his implant alone prevent him from returning to his previous job and impose significant hurdles in the identification of suitable alternative employment. Therefore, pursuant to *Green*, "claimant is entitled to benefits for the full loss in wage-earning capacity due to his [back] impairment irrespective of the effect of his [foot] injury on this loss in wage-earning capacity." 32 BRBS at 70.

Ms. Favaloro released her first labor market survey on October 8, 2003, identifying seven jobs which were within Claimant's restrictions and approved by Dr. Hubbell and Dr. Steiner. These positions were: dispatcher ($9.19/hr), toll collector ($7.50/hr), parking booth attendant ($7/hr), dispatcher ($6.75/hr), unarmed gate guard ($7.50/hr), total rewards host ($8.50/hr) and production technician ($7.50/hr). The average hourly wages for these seven jobs is $7.71, which results in $308.23 per 40-hour work week. Ms. Favaloro's March 4, 2004 report listed a total of 13 positions, five of which I find unsuitable in light of the restrictions set forth in Dr. Hubbell's January 16, 2004 letter. The remaining eight positions include production worker ($6.50/hr), garage cashier ($8/hr), lock and dam equipment worker ($14.61/hr), dispatcher ($10/hr), forklift operator ($6.50/hr), dispatcher ($9.67/hr), shuttle bus driver ($9/hr), chauffeur/driver ($8/hr). The average hourly wage of these eight jobs is $10.69, which computes to $427.50 per 40-hour work week.

In light of the foregoing, I find Claimant was temporarily totally disabled from the date of his injury, September 18, 2000, until October 8, 2003, when Employer established suitable alternative employment. Claimant was temporarily partially disabled from October 8, 2003 until March 4, 2004, based on a reduced wage earning capacity of $308.23 per week. Claimant has been temporarily partially disabled since March 4, 2004, based on a residual wage earning capacity of $427.50.

Mindful, however, of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, 23 BRBS 330 (1990), Claimant's wages are adjusted to reflect their value at the time of Claimant's September 2000 injury. The National Average Weekly Wage (NAWW) for September 2000 was $450.64. The NAWW for October 2003 and March 2004 was $515.39. Thus, the 2000 NAWW was approximately 87% of the 2003 and 2004 NAWW. Therefore, Claimant's wage earning capacity must be adjusted accordingly. Based on these adjustments, I find that Claimant had residual wage earning capacities of $268.16 and $371.93 respectively.

Average Weekly Wage

Pursuant to Claimant's wage records, submitted as CX-16, he earned a total of $28,731.39 at Employer in the 52 weeks preceding his injury on September 18, 2000. Claimant contends this total should be divided by 41, the number of weeks actually worked, whereas Employer contends the total should be divided by 52 weeks because Claimant voluntarily left the labor market.

Average weekly wage shall be determined under Section 10(c) of the Act whenever there is insufficient evidence in the record to make a determination of average daily wage under either Sections 10(a) or (b). *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976). As Claimant's wage records only indicate his weekly earnings, and not his daily earnings, 10(c) is appropriate in this case. Furthermore, under 10(c) a claimant's actual wages should be used where he voluntarily leaves the labor market and, therefore, has earnings lower than his earning capacity. To hold an employer responsible for claimant's pre-injury removal of self from the work force would be manifestly unfair. *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987); *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128, 130 (1986).

Claimant testified he voluntarily removed himself from the Longshore work force for 11 weeks prior to his work injury, in the attempt to start his own pressure washing business. When this business failed, he returned to Longshore work. In keeping with the Board's precedent, Claimant's average weekly wage should reflect his actual earnings. As such, I find his total earnings, $28,731.39, shall be divided by 52 weeks to result in an average weekly wage of $552.53.

Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to

require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). When an employer refuses a claimant's request for authorization for medical treatment, the claimant is released from the obligation of continuing to seek approval for subsequent treatments, and thereafter need only establish that subsequent treatment was necessary for his injury in order to be entitled to such treatment at employer's expense. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

An employee has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. § 907(b) (2003). When a claimant wishes to change treating physicians, the claimant must first request consent for a change, and consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. 33 U.S.C. § 907(c)(2) (2002); 20 C.F.R. § 702.406(a) (2001); *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 309 (1992). In all other situations, the employer may consent to a change of physician for good cause but is not required to. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 665 (1982)(stating that even if the claimant had established "good cause" for change the employer was not required to authorize the change). Where an authorized physician retires and refers the claimant to a new physician, no new authorization is required. *Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299, 301-02 (1992).

The medical expenses currently in issue include the treatment rendered by Dr. Murphy and Dr. Macgregor.

Claimant contends he is entitled to orthopedic treatment by Dr. Murphy because his choice of orthopedist, Dr. Manale, retired from practice. While this would entitle Claimant to authorization to see Dr. Murphy, Claimant still must establish the treatment is reasonable and necessary. Claimant was last seen by an orthopedist, Dr. Manale, in October 2001. He did not see Dr. Murphy until March 2004. Dr. Manale did not refer Claimant to Dr. Murphy, nor did Claimant's treating physician, Dr. Hubbell. There is no indication in the record that Claimant needed to be examined or treated by an orthopedic specialist. Dr. Murphy himself stated "as an orthopedist I really have nothing to offer this patient. He should continue his chronic pain management with Dr. Hubbell." As such, I find Claimant failed to establish that Dr. Murphy's examination was reasonable and necessary for the treatment of his back or foot injuries. Employer is therefore not liable for Dr. Murphy's medical bill.

Claimant further contends he is entitled to treatment by Dr. Macgregor because he was unable to get an appointment with Dr. Wolfson and, additionally, Dr. Macgregor is a psychiatrist while Dr. Wolfson is a psychologist. Although apparently unable to get an appointment with Dr. Wolfson, Claimant testified he was never expressly denied authorization to see him. Furthermore, there is no record in Dr. Wolfson's medical reports of calls made by Claimant in an attempt to make an appointment. Mr. Arceneaux testified he never denied authorization for Claimant to treat with Dr. Wolfson.

Although Dr. Macgregor is a psychiatrist and Dr. Wolfson is a psychologist I find they perform essentially the same function in treating Claimant's psychological problems. Claimant did not have any complaints about Dr. Wolfson in 2002; indeed he received benefit from the treatment and initially tried to see Dr. Wolfson again in 2003. There is no explanation why Claimant sought treatment with a psychiatrist instead of a psychologist in November 2003, and I find that he cannot use this difference in title as a reason for receiving authorization to change physicians. Although Dr. Macgregor and Dr. Culver both identified psychological problems, which I previously found compensable under the Act, and for which Claimant is entitled to treatment, I do not find Employer liable for Dr. Macgregor's bill inasmuch as Claimant sought no consent for Dr. Macgregor's treatment. There is no evidence Claimant was denied treatment from Dr. Wolfson or will now be if he elects further psychological treatment.[4]

ORDER

It is hereby **ORDERED** that:

1. Employer shall pay to Claimant permanent partial disability compensation in accordance with §8(c)(4) of the Act for a 15% impairment to his right foot, based on an average weekly wage of $552.53 for 30.75 weeks; provided, however, this scheduled award shall not commence until such time as Claimant's unscheduled award is reduced or discontinued so that the amount of Claimant's weekly compensation never exceeds 66.6% of his average weekly wage;

2. Employer shall pay to Claimant temporary total disability compensation in accordance with § 8(b) of the Act from September 18, 2000 until October 8, 2003, based upon the average weekly wage of $552.53;

3. Employer shall pay to Claimant temporary partial disability compensation in accordance with § 8(e) of the Act from October 8, 2003 to March 4, 2004, based upon the average weekly wage of $552.53, reduced by Claimant's residual wage earning capacity of $268.16;

4. Employer shall pay to Claimant temporary partial disability compensation in accordance with § 8(e) of the Act from March 4, 2004 and continuing, based upon the average weekly wage of $552.53, reduced by Claimant's residual wage earning capacity of $371.93;

5. Employer shall receive a credit for all benefits previously paid to Claimant, including $2,392.34 Claimant concedes he has earned since his accident[5];

[4] I find Dr. Wolfson remains Claimant's choice of psychologist/psychiatrist. Claimant must properly request authorization from Employer to change.

[5] Since his accident, Claimant acknowledges he has earned $3,588.50 in various attempts to work. Two-thirds of that amount is $2,392.34.

6. Claimant's claim for medical expenses associated with the examinations and treatments provided by Drs. Murphy and Macgregor are **DENIED**. Employer, however, remains liable for all other reasonable and necessary medical expenses pursuant to Section 7 of the Act;

7. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided in 28 U.S.C. § 1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

8. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See* 20 C.F.R. § 702.132.

9. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 15th day of July, 2004, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge